STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTAWIN FOWLER,

Defendant-Appellant.

UNPUBLISHED
May 26, 2000

No. 217832
Kent Circuit Court
LC No. 97-012842-FC

Before: Doctoroff, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant Antawin Fowler was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). He was sentenced to a term of 3 to 6 years' imprisonment on the conviction of assault with intent to commit murder, to a mandatory two years' imprisonment on the conviction of felony-firearm, and to a term of 3 to 7½ years' imprisonment on the conviction of felon in possession of a firearm. Defendant appeals as of right. We affirm.

This case arises from an altercation between four men, including defendant, Stashio Reddick, Stephan Gordon, and Michael George, at the intersection of Cherry Street and Union Avenue in Grand Rapids. At trial, the only fact that was in dispute was whether defendant intended to kill George when defendant fired a gun. On appeal, defendant claims that defense counsel made two serious mistakes that violated his constitutional right to effective assistance of counsel. According to defendant, he was denied the effective assistance of counsel because defense counsel failed to mitigate the prejudicial effect of a prior felony conviction by offering to stipulate to the existence of an unspecified prior felony conviction as the predicate felony for felon in possession of a firearm, and defense counsel failed to request a jury instruction on self-defense. We disagree.

Defendant failed to request an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); therefore, we review defendant's claim of ineffective assistance of counsel only to the extent that defense counsel's mistakes are apparent on the record. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). Our Supreme Court has noted that a claim

of ineffective assistance of counsel must be examined under the United States Supreme Court's standard in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 326; 521 NW2d 797 (1994). Under *Strickland*, a defendant must satisfy a two-pronged test to establish a claim of ineffective assistance of counsel. *Strickland*, *supra*, 466 US 687. The defendant must first demonstrate that counsel's performance was deficient by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. Then, the defendant must demonstrate that counsel's deficient performance prejudiced the defense by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

Each of defendant's claims of ineffective assistance of counsel fails the two-pronged test in *Strickland*. Defense counsel's performance was not deficient in either regard.

Defendant first claims that defense counsel failed to stipulate to an unspecified prior felony conviction as the predicate felony for felon in possession of a firearm. We have recently noted that "[i]n order to prove a defendant's guilt of a charge of felon in possession, the prosecution must establish that the defendant was convicted of a felony . . . ." *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999). Although a felony conviction is a required element of establishing a defendant's guilt of a charge of felon in possession, the prosecution and the defense counsel may agree to stipulate that the defendant has been convicted of an unspecified prior felony in order to minimize any prejudice to the defendant. See *id*.; *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998); *People v Swint*, 225 Mich App 353, 377; 572 NW2d 666 (1997). However, where the defense counsel has not offered to stipulate to the defendant's prior felony conviction, the prosecutor is allowed to introduce evidence of the name and nature of the defendant's prior felony conviction. See *Nimeth*, *supra*, 627; *Green*, *supra*, 691; *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997).

In the instant case, defense counsel did not offer to stipulate that defendant has been convicted of an unspecified prior felony. Instead, defense counsel elicited testimony from defendant that revealed that defendant had been convicted of attempted CCW. Because defendant failed to request a *Ginther* hearing, the record is silent as to defense counsel's reasoning for not stipulating that defendant had been convicted of an unspecified felony. See *Harris*, *supra*, 154. Thus, we presume that trial counsel's failure to stipulate is trial strategy, e.g., that defense counsel strategically decided to reveal the name and nature of defendant's prior felony conviction, rather than allow the jury to speculate on the nature of that prior felony. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Our Supreme Court has elaborated on the discretion afforded to a criminal defense attorney:

> Every criminal defense attorney must make strategic and tactical decisions that affect the defense undertaken at trial. . . . Defense counsel must be afforded "broad discretion" in the handling of cases, which often results in "taking the calculated risks which still do sometimes, at least, pluck legal victory out of legal defeat." [*Pickens*, *supra*, 324-325 (quoting *People v Lundberg*, 364 Mich 596, 600, 601; 111 NW2d 809 [1961]).]

Further, this Court has noted that it "will not second-guess counsel regarding matters of trial strategy, and . . . this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defense counsel's strategic choice to reveal the name and nature of defendant's prior felony conviction does not render her performance deficient merely because defendant was not acquitted of all counts. See *Pickens*, *supra*, 330; *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987) (noting that "[a] court cannot conclude that effective assistance of counsel is denied merely because a certain trial strategy backfired." *Id*.). Therefore, because defense counsel's failure to offer to stipulate is presumed to be trial strategy, we will not substitute our judgment for that of trial counsel. See *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

Defendant's second claim that defense counsel erred by failing to request a jury instruction on self-defense also fails. Our Supreme Court has noted that "the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Further, except where assaulted in his own dwelling, there must have been no way open to the accused for retreat. See *People v Dabish*, 181 Mich App 469, 474-477; 450 NW2d 44 (1989); *People v Bright*, 50 Mich App 401, 406; 213 NW2d 279 (1973).

The facts of the instant case did not justify defense counsel to request a jury instruction on self-defense because defendant testified that he fired the first five shots in order to frighten George, and that he fired the last two shots in order to prove to Riddick and George that his gun was real. See *People v Bryant*, 129 Mich App 574, 582; 342 NW2d 86 (1983). Although defendant testified that he thought that George wanted to fight (i.e., George claimed that he was a gang member of the "Wealthy Street Boys," that George told defendant that he was "going to handle his business," which meant that George was going to fight, and that George removed his sweatshirt as if preparing to fight), defendant never testified that he fired his gun in self-defense. Ultimately, defendant's defense was not that he was trying to defend himself from a felonious assault, but rather defendant's defense was that he did not intend to kill anyone.

We have noted that "[t]rial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393; __ NW2d __ (2000); see *People v Maleski*, 220 Mich App 518, 523-524; 560 NW2d 71 (1996). Because there are insufficient facts to justify requesting a jury instruction for self-defense, see *Snider*, *supra*, defendant cannot demonstrate the first *Strickland* requirement that defense counsel's performance was deficient. *Strickland*, *supra*, 466 US 687. Therefore, there is no need to address whether defendant was prejudiced by defense counsel's performance because defendant has failed to demonstrate that defense counsel performed deficiently. See *Truong*, *supra*, 341 (noting that "[t]rial counsel's failure to request an instruction inapplicable to the facts at bar does not constitute ineffective assistance of counsel." *Id*.).

For the reasons discussed, defendant has failed to demonstrate that defense counsel's failure to stipulate to an unspecified prior felony conviction as the predicate felony for felon in possession of a

firearm and to request a jury instruction on self-defense deprived defendant of the effective assistance of counsel. See *Pickens*, *supra*, 312.

Affirmed.

/s/ Martin M. Doctoroff
/s/ David H. Sawyer
/s/ Mark J. Cavanagh